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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 MICHAEL DAVIS,

12 Petitioner,

2:04-cv-00236-GEB-KJM-P

13 vs.

14 J. SILVA, Warden,

15 Respondent.

ORDER

16 _____/
17 Petitioner, a state prisoner proceeding pro se, has
18 timely filed a notice of appeal of this court's August 19, 2005
19 Petitioner, a state prisoner proceeding pro se, has timely filed
20 a notice of appeal of this court's August 19, 2005 dismissal of
21 his application for a writ of habeas corpus for failure to
22 exhaust state remedies. Before petitioner can appeal this
23 decision, a certificate of appealability must issue. 28 U.S.C.
24 § 2253(c); Fed. R. App. P. 22(b).

25 A certificate of appealability may issue under 28
26 U.S.C. § 2253 "only if the applicant has made a substantial

1 showing of the denial of a constitutional right." 28 U.S.C.
2 § 2253(c)(2). The court must either issue a certificate of
3 appealability indicating which issues satisfy the required
4 showing or must state the reasons why such a certificate should
5 not issue. Fed. R. App. P. 22(b).

6 Where, as here, the petition was dismissed on
7 procedural grounds, a certificate of appealability "should issue
8 if the prisoner can show: (1) 'that jurists of reason would find
9 it debatable whether the district court was correct in its
10 procedural ruling'; and (2) 'that jurists of reason would find it
11 debatable whether the petition states a valid claim of the denial
12 of a constitutional right.'" Morris v. Woodford, 229 F.3d 775,
13 780 (9th Cir. 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 120
14 S. Ct. 1595, 1604 (2000)).

15 After careful review of the entire record herein, this
16 court finds that petitioner has not satisfied the first
17 requirement for issuance of a certificate of appealability in
18 this case. Specifically, there is no showing that jurists of
19 reason would find it debatable whether petitioner has exhausted
20 state remedies. Accordingly, a certificate of appealability
21 should not issue in this action.

22 IT IS SO ORDERED.

23 Dated: September 14, 2005

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25 /s/ Garland E. Burrell, Jr.
26 GARLAND E. BURRELL, JR.
United States District Judge

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